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No. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**
**October Term, 1987**

CLIFFORD P. GENDRON
AND
LEONARD B. BELL

Petitioners

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Respondent

**PETITION FOR A WRIT OF CERTIORARI**
**TO THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

Petitioners respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 30, 1987.

**QUESTIONS PRESENTED FOR REVIEW**

1. Can a corporate employer engaged in multistate interstate commerce, with units of employment in several states, rebut a prima facie case of age discrimination by producing evidence of a business reason other than age isolated to a single, intrastate unit of employment subject of a reduction in force?

2. Is age discrimination on its face established by a showing on the face of the documentary evidence

relevant to an employer's peer analysis for a reduction in force that the employer has:

(a) Classified the older (protected) employees in a peer group for which the older employees lack the required qualifications for the job;

(b) Dilutes the competitive advantage of the older employees' management experience by giving the younger employee gratuitous credits because the younger employee lacks necessary management experience;

(c) Recognizes the longevity of the younger employee with the company but fails to recognize the more extensive longevity with the company of the older employees.

(d) Creates a fifty percent (50%) pension differential based on age

by classifying the older employees as inactive at the time they will attain the age of eligibility for vested retirement benefits?

3. Can extrinsic parol evidence be admitted to prove a company policy not written into a multistate, interstate, corporate employer's personnel policy manual, where such proof is for the purpose of articulating a legitimate non-discriminatory reason for terminating employees protected by the Age Discrimination in Employment Act? (ADEA)

4. Does manifest injustice result to the prejudice of ADEA protected employees where the employer is permitted to disregard the pre-trial orders of the District Court by being 20 days dilatory in filing its witness list, leaves only 10 days for the

protected employees to complete discovery and, the parol evidence of those witnesses determines the outcome of the case?

5. Can parol evidence be admitted to vary the terms of documents which, in the course of pre-trial procedure, have been stipulated by counsel for all parties to be authentic?

6. What is the relief to which the ADEA protected employees are entitled?

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## OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is not reported and appears as Appendix A hereto. That Opinion summarily affirmed the judgment by the district court against all of plaintiffs' claims. The Opinion of the district court, not reported, appears in Appendix B hereto.

## STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 30, 1987.

Petitioners made no application for rehearing and this petition for certiorari was filed within 90 days of that date.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

## STATUTES INVOLVED

The sections of the Age Discrimination In Employment Act (ADEA) 29 U.S.C. § 621-634 which this case involves are: § 621(a) 1-4 and (b); § 623 1-3; § 626(b) & (c) 1-2; and § 631(a). See Appendix C for full text.

**STATEMENT OF THE CASE**

Plaintiffs were employed by defendant as part of defendant's Maintenance and Operations Section until May 15, 1984 at which time the plaintiffs herein were advised by letter that effective at the close of business on that day their employment was terminated as part of defendant's continuing efforts to substantially reduce expenses.

Pan American World Airways, Inc. is a foreign corporation domiciled in the State of New York in which it also maintains its principal office and is registered to do business in the State of Louisiana, and was doing business in the State of Louisiana at all times material to the allegations in this complaint.

Plaintiff, Clifford P. Gendron, filed Charge No. 062-84-2380 with the Equal Employment Opportunity Commission (EEOC) under the Age Discrimination in Employment Act (ADEA).

Plaintiff, Leonard B. Bell, filed Charge No. 062-84-2378 with the Equal Employment Opportunity Commission (EEOC) under the Age Discrimination in Employment Act (ADEA).

On February 22, 1985, the EEOC notified plaintiffs that it would not proceed further with its processing of the above referenced charges under the ADEA, and at that time advised plaintiffs of their right to sue.

At all time material to this complaint the location of employment was New Orleans International Airport, Kenner, Louisiana.

Plaintiff, Mr. Clifford P. Gendron, at the time of his termination of employment with the defendant was a Supervisor of Maintenance/Operations, had completed 22 years of service, was 47 years of age and was earning an annual base pay of $30,540.00.

Plaintiff, Mr. Leonard B. Bell, at the time of his termination of employment with the defendant was a Supervisor of Maintenance/Operations, had completed 17 years of service, was 42 years of age and was earning an annual base salary of $30,540.00.

The termination of plaintiffs by the defendant was a constructive retirement of the plaintiffs to an inactive employee retirement status.

The difference in the retirement benefits which the plaintiffs will receive is solely dependent upon their

age at the time of their termination.

Because of their age at the time of the termination, plaintiffs will receive significantly lower retirement benefits.

Pan American World Airways, Inc. is not your neighborhood grocery. When the station in New Orleans was finally closed, the younger employee was not terminated because his position was abolished. He was transferred and his personnel file shows that his title remained the same as Gendron's and Bell's had been. Pan Am is asserting that the abolishment of positions in New Orleans was a valid reason for terminating Gendron and Bell. When transferred, the younger employee was given an altogether different job, totally without regard

for the alleged value to the company of an FAA "A & P" license.

The termination of plaintiffs' employment constituted a partial closing of an isolated intrastate employment unit which was part of a system of multistate, interstate employment units operated by defendant in the course of its business. There was no attempt made by the employer, during its peer analysis for reduction in force, to classify plaintiffs within the employer's interstate business system of employment. Plaintiffs' duties and job performance are readily identifiable with a classification established by the employer within its interstate employment practices. The employer makes interstate transfers of employees within that classification.

Gendron's and Bell's work history in management was subject of annual performance assessments. These assessments were in writing and never did they raise a question about lacking a required qualification for the job, i.e. an FAA A & P license. The written policy of Pan Am requires previous performance assessments to be reviewed for reduction in force. The peer analysis forms do not give any credit for previous performance assessments of Gendron and Bell; on the contrary, extra credit is given to the younger employee for not having performed because of being in the position less than one year. Again, age discrimination on the face of the document.

There are two versions of Pan Am's written company policy in evidence regarding management reduction in force: Plaintiffs' Exhibit No. 7 and Defendant's Exhibit No. 57.

Plaintiff's version shows a date of July 1, 1981. It requires that the employee be given additional consideration for age, sex and race in accordance with the company's Affirmative Action Program.

Defendant's version shows a later date, November 15, 1983. It deleted the requirement set forth above. This deletion from the policy manual is direct evidence of age discrimination.

The written company policy of both versions requires the supervisor concerned to rate individuals on the basis of performance when compared

to the logical group of peers in a particular unit, section or shop appropriate to the employee's work history.

Neither Gendron nor Bell was compared to a logical group of peers, instead, they were compared with a mechanic who had recently been brought into management. The focus of the peer analysis was the FAA A & P license held by the mechanic, a management trainee for only ten months.

In performing the peer analysis for the management reduction in force, Pan Am imposed a qualification for the job which did not exist upon Gendron and Bell, i.e. the "A & P" license. They were thus classified in a peer group in such a manner that their destiny was pre-determined by the employer. They were not terminated

as a result of a peer analysis conducted in accordance with the written policy; rather they were terminated solely because of an unwritten policy established by the parol evidence of a single witness; furthermore the dated documentary evidence, Plaintiff's Exhibit No. 14 being the same as Defendant's Exhibit No. 5, establishes that the decision to terminate was made sometime prior to March 12, 1984 or six weeks prior to the date of the peer analysis, April 30, 1984.

Thus, the peer analysis was a sham. Pan Am knew that neither Gendron nor Bell was required to have an FAA "A & P" license. By imposing that qualification as a requirement in connection with a sham peer analysis, Pan Am acted willfully and with reckless

disregard of the Age Discrimination in Employment Act.

Gendron and Bell have a vested interest in Pan Am's retirement system. Solely because of their age, they are disqualified from eligibility for retirement as an "active" employee. They cannot now draw retirement benefits. When they reach a certain age, their benefits will be reduced by approximately 50% because upon obtaining that age they will be an "inactive" employee. Thus, age was a determining factor in the employer's decision. Gendron and Bell have shown this by a preponderance of the evidence.

## REASONS FOR ALLOWING THE WRIT

### Summary

A prima facie case of age discrimination was made in connection with a partial closing of a business;

therefore, a discriminatory partial closing has been established in the record below. This Court has held that a discriminatory partial closing is an unfair labor practice prohibited by the National Labor Relations Act. Textile Workers, infra. Therefore, an important question of federal law which has not been, but should be settled by this Court is present on the face of this record:

Whether or not an unfair labor practice prohibited by the National Labor Relations Act, can be asserted by an employer as a business reason other than age to rebut a prima facie case of age discrimination arising under the Age Discrimination in Employment Act.

The decision of the United States Court of Appeals for the District

of Columbia, Coburn, infra, and that of the Fifth Circuit in these proceedings are in conflict on the same matter: the weight to be given to the personnel policy manual of defendant, Pan American World Airways, Inc. in ADEA cases.

Relying entirely upon parol evidence, the District Court did not scrutinize the documentary evidence constituting direct evidence of discrimination and applied the McDonnell Douglas, infra, test. The Court of Appeals summarily affirmed without jurisprudential analysis. This Court has held that the McDonnell Douglas, infra, test is inapplicable where the plaintiff presents direct evidence of discrimination. Transworld Airlines, Inc., infra. The lower court so far departed from the accepted and usual

course of judicial proceedings, which the Court of Appeals sanctioned, as to call for an exercise of this Court's power of supervision.

**Argument Amplifying The Reasons:**

I. AN EMPLOYER CANNOT REBUT A PRIMA FACIE CASE OF AGE DISCRIMINATION BY CLAIMING A PARTIAL CLOSURE OF HIS MULTISTATE BUSINESS AS A BUSINESS REASON OTHER THAN AGE.

The Honorable Court has held that its "...interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, et seq. applies with equal force in the context of age discrimination..." Transworld Airlines, Inc. v. Thurston, 105 S.Ct. 613 (1985).

Likewise, in Lorillard v. Pons, 434 U.S. 575, 55 L.Ed 2d 40, 98 S.Ct. 866, this Honorable Court examined

the enforcement scheme of the ADEA, and with respect to the Fair Labor Standards Act (FLSA) 29 USC §§ 201 et seq., said:

> So too, where, as here, Congress adopts a new law incorporating section of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.
>
> That presumption is particularly appropriate here since, in encacting the ADEA, Congress exhibited both a detailed knowledge of the FLSA provisions and their judicial interpretation and a willingness to depart from those provisions regarded as undesirable or inappropriate for incorporation.

In considering the legislative debates preceding passage of the ADEA, in Lorillard, supra, this Court found that Congress also exhibited a detailed knowledge of the National Labor Relations Act (NLRA) and found that act to have been an integral part

of the development of the ADEA, saying:

> ...Several alternative proposals were considered by Congress. The Administration submitted a bill, modeled after § 10(c), (e) of the National Labor Relations Act, 29 USC § 160(c), (e)...

Accordingly, Congress can be presumed to have had knowledge of the judicial interpretations of the NLRA. Unless Congress can be shown to have expressed a willingness to depart from those judicial interpretations, decisions aimed at protecting the employee from unfair labor practices, should be applicable as well to the aim of the elimination of discrimination from the workplace.

Pan American World Airways, Inc.'s New Orleans station was permanently closed at the time of the trial on the merits. There can be no dispute that the termination of petitioners

herein was part of a partial closing of the New Orleans station.

Since a prima facie case of age discrimination was made in the District Court, and recognized by the Court of Appeals, the partial closing was discriminatory under the ADEA. A discriminatory partial closing is an unfair labor practice prohibited by the NLRA. Textile Workers v. Darlington Mfg. Co. 380, US 263, 13 LEd 2d 827, 85 S.Ct. 994. Since the two statutes have as their aim the protection of the employee in his workplace, an unfair labor practice cannot be a valid business reason other than age for termination of a protected employee.

II. CONFLICT WITH DECISION OF ANOTHER FEDERAL COURT OF APPEALS ON SAME MATTER.

Pan Am's personnel policy manual constitutes a written agreement with its employees. The importance of that document has been judicially recognized by the United States Court of Appeals for the District of Columbia. In Coburn v. Pan American World Airways, Inc., 711 F.2d 339 (1983) that Court found:

> We find that Pan Am carried its burden of proffering a ligitimate, nondiscriminatory reason for terminating Coburn by instituting a written policy, following it to the letter, and making an employment decision based on its results. The procedure satisfied Pan Am's statutory burden. (Emphasis added)

In terminating Gendron and Bell, Pan Am did not follow the written policy it instituted; rather, it

disregarded that policy in favor of the purported unwritten policy established by an employee, Mr. Vitale, and his parol evidence. Thus the decision of the United States Court of Appeals for the Fifth Circuit in these proceedings is in conflict with that for the District of Columbia.

III. DIRECT EVIDENCE OF DISCRIMINATION ON THE FACE OF THE DOCUMENTS.

The Supreme Court of the United States has recently issued its leading case to interpret several aspects of the Age Discrimination in Employment Act. Transworld Airlines, Inc., v. Thurston, 105 S.Ct. 613 (1985). That case involved the mandatory retirement of protected employees because of their age in connection with a retirement policy which required that the protected employee be retired

without being given the right to qualify for another employment status within the company.

The Age Discrimination in Employment Act (ADEA) was amended in 1978 to prohibit the mandatory retirement of a protected employee because of his age. The plaintiffs in this case have been subjected to a type of mandatory retirement which, because of their age at the time of retirement, they will lose significant benefits of rights to which they had become vested. The plaintiffs have been put on an "inactive employee retirement status". Because of their age at the time of being placed in that status, they cannot draw benefits to which they would otherwise be entitled if they had been retired as "an active employee". The difference

in the benefits which the plaintiffs are to receive is solely dependent upon their age at the time of retirement. The plaintiffs presented direct evidence of discrimination on its face that the retirement method available to them depends solely upon their age at the time of their involuntary termination by the defendant, Pan American World Airways, Inc. This discrimination takes place in two ways:

(1) The amount of money which the employee is to receive as well as other benefits, such as lifetime pass privileges and fully paid insurance benefits;

and,

(2) The point in time in which the plaintiffs were to become eligible to receive the benefits.

Furthermore, Pan Am's retirement policy is not part of a "bona fide seniority system" and thus is not exempt from the Act's coverage. 29 U.S.C., Section 623 (f) (2).

The plaintiffs were qualified for the positions from which they were terminated; Gendron with 22 years of completed service and Bell with 17 years of completed service. But for age, any employee with that amount of completed service would receive the retirement benefits afforded to "an active employee" at the time the

benefits commenced. Such is direct evidence of discrimination because of age. In the TWA case, the Supreme Court said:

> "TWA contends that the respondents failed to make out a prima facie case of age discrimination under McDonnell Douglas v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d, 668 (1973), because at the time they were retired, no flight engineer vacancies existed. This argument fails, for the McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination. See Teamsters v. United States, 431 U.S. 324, 358 n. 44, 97 S. Ct. 1843, 1866 n. 44, 52 L. Ed. 2d, 396 (1977). The shifting burdens of proof set forth in McDonnell Douglas are designed to assure that the 'plaintiff [has] his day in court despite the unavailability of direct evidence.' Loeb v. Textron, Inc., 600 F. 2d 1003, 1014 (CA 1979). In this case there is direct evidence that the method of transfer available to a disqualified captain depends upon his

> age. Since it allows captains who become disqualified for any reason other than age to 'bump' less senior flight engineers, TWA's transfer policy is discriminatory on its face. Cf. Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978) (Employer's policy requiring female employees to make larger contribution to pension fund than male employees is discriminatory on its face).

In this case the evidence shows that the amount of retirement available to the plaintiffs upon their termination depends soley upon their age.

The plaintiffs have thus proved by direct evidence that defendant's termination of them was for the purpose of reducing their retirement benefits as protected employees, solely on the basis of age. The Supreme Court of the United States has clearly held in Transworld Airlines, Inc., supra,

at page 623, that such conduct is clearly what Congress intended to prohibit:

> ". . .In 1978, Congress amended ADEA, Section 4 (f) (2) 29 U.S.C., Section 623 (f) (2), to prohibit the involuntary retirement of protected individuals on the basis of age."

Additionally, in the personnel policy manual of Pan American World Airways, Inc., respondent herein agrees to conduct a peer group evaluation prior to effecting a reduction in force of management employees. This is clearly not required by the Transworld Airlines, Inc. case, wherein the Supreme Court said, at page 621:

> "The Act does not require TWA to grant transfer privileges to disqualified captains. Nevertheless, if TWA does grant some disqualified captains the "privilege" of "bumping" less senior flight engineers, it may not deny this

> opportunity to others because of their age. In Hishon v. Kinger & Spalding, 457 U.S. _____, 104 S. Ct. 2229, 81 L. Ed. 2d 59, (1984), we held that "[a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free...not to provide the benefit at all." Id, at _____, 104 S.Ct. @ 2234. This interpretation of Title VII of the Civil Rights Act of 1964, 42 U.S.C., Section 2000 e, et seq, applies with equal force in the context of age discrimination, for the substantive provisions of the ADEA "were derived in haec verba from Title VII." Lorillard v. Pons, supra, 434 U. S. 584, 98 S. Ct. 872."

However, the benefit of a peer analysis may not be doled out in a discriminatory fashion by classifying the employee in a group which requires qualifications of the employee that were never before required and which the employee does not possess.

The personnel policy manual required that Gendron and Bell be rated "on the basis of performance when compared to the logical group of peers in a particular unit, section or shop appropriate to the employee's work history." Their personnel files are in evidence. Their work history is documented in those files and is void of any reference to or requirement of being licensed by the FAA as an "A & P" mechanic. To place them in a peer group in which that requirement is mandatory defies logic.

Gendron and Bell were subject to an annual management performance assessment. These written assessments are part of their personnel files. Pan Am had never once assessed their performance negatively because they were not FAA licensees. They were

never notified that in order to maintain their position with Pan Am they would be required to hold an FAA, "A & P" license.

Neither Gendron nor Bell was given consideration for length of service in the peer analysis. The younger employee was.

First, the 1984 Management Performance Assessments for Gendron, Bell and the younger employee should be scrutinized. Those documents contain a section entitled "KEY JOB ELEMENTS OR OBJECTIVES (MBO)". The FAA "A & P" license is not listed as a requirement in those assessments in January, 1984 --- only four months before the termination of Gendron and Bell.

Secondly, the peer analysis forms are an obvious sham when compared

with the usual assessment of management employees using the Management Performance Assessment form. The peer analysis is a one page document which considers only three (3) categories; the Management Performance Assessment form is five (5) pages in length, considers thirteen (13) specifically identified categories and requires a detailed description of key job elements and performance results. Indeed, the personnel policy manual places significance on all past management performance assessments. Nowhere in the peer analysis was consideration given to plaintiffs for prior assessments. It is discriminatory on its face.

IV. DEPARTURE FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES.

The judgment of the District

Judge was based entirely upon parol evidence. In doing so manifest injustice was done to Gendron and Bell because the District Judge failed to enforce the pre-trial notice he issued. Counsel for Gendron and Bell made a motion to that effect at commencement of trial, which was denied.

Manifest injustice resulted to the prejudice of Gendron and Bell because of the significance given the parol evidence by the District Judge. Pan Am filed its witness list 20 days late. This left only 10 days remaining before discovery cutoff. Pan Am's key witness was Mr. Vincent J. Vitale. He gave the parol evidence about Pan Am's unwritten policy which the District Judge found was a valid business reason for its termination of Gendron and Bell. That witness

was an out-of-state witness from Pan Am's headquarters in New York.

Of the ten (10) days remaining before discovery cutoff, four (4) were on weekends. Counsel for Gendron and Bell had at most six (6) days to drop everything else on his calendar to schedule discovery. It is just not fair. It is unreasonable to expect any counsel to be able to schedule and complete out-of-state depositions in one working week. The scheduling order allowed four (4) working weeks.

Gendron and Bell wanted their day in court and, as the record reflects, opposed all efforts by Pan Am to obtain a continuance. They complied with the scheduling order and because the District Judge failed to enforce his pre-trial scheduling

order, Gendron and Bell did not receive a fair trial.

Further parol evidence was given by Pan Am's second most important witness, General Manager Vernon J. Hood. His parol evidence was permiteed to vary the date appearing on a key document, admitted as authentic by all counsel and described as March 12, 1984 chart: "New Orleans Management Staff: Positions to be Abolished." The date on that chart is significant because it establishes that the decision to terminate Gendron and Bell was made at least six weeks before the peer analysis, which is dated April 30, 1984.

Over objection, the parol evidence of Mr. Hood alludes to another set of documents of which the March 12, 1984 chart was allegedly part. Although

those documents were neither specifically identified not introduced into evidence, the District Judge accepted Mr. Hood's parol testimony to vary the face of the document, i.e. the date.

Again, Gendron and Bell's counsel did not have notice until ten (10) days before discovery cutoff that Mr. Hood would be a witness. It would have been impossible to depose Mr. Hood, learn of documents alluded to as the crucial explanation and request production of those documents.

The motion to preclude Pan Am from calling any witnesses made by counsel for Gendron and Bell at the commencement of trial should have been granted. That parol evidence should be disregarded by this Honorable Court because it was admitted into

evidence under circumstances which prejudiced Gendron and Bell; furthermore, the admission of that parol evidence did not adhere to the established pre-trial procedure and resulted in manifest injustice to Gendron and Bell.

Counsel for Gendron and Bell filed their witness list timely; nevertheless, counsel for Pan Am claimed prejudice because a brief description of the testimony of each witness was not part of the witness list. It was on that basis that the District Judge concluded that counsel for Gendron and Bell was in non-compliance as well and denied his motion. The District Judge overstated the prejudice to Pan Am. Actually, there was no prejudice to Pan Am because Gendron

and Bell's witness list did not briefly describe testimony.

Counsel for plaintiffs invoked the sanctions of paragraph 13c of the pre-trial notice against the defendant.

Counsel for plaintiffs was prejudiced by the dilatory tactics of the defendant which deprived counsel for plaintiff of scheduling further discovery.

Counsel for defendant was not at all prejudiced by his complaints regarding the failure of plaintiffs' witness list to state a brief description of the testimony because plaintiffs were the only witnesses called and their depositions had been taken more than six (6) weeks prior to the filing of their witness list; additionally, all of the persons listed

on plaintiffs' witness list are either currently employed by, or were former employees of, defendant and are not strangers to the defendant. No possible prejudice could result to Pan Am.

There is yet another reason that the parol evidence should have been excluded. Parole evidence cannot be admitted to vary the terms of documents which have been admitted into evidence upon stipulation of counsel for all parties as to their admissibility and authenticity.

A stipulation binds the parties to the terms actually agreed upon. Rice v. Glad Hands, Inc., 750 F.2d 434 (1985, CA5). Not only was it a part of the stipulation cited above, but also, in connection with the admission of Pan Am's exhibits, a second stipulation occurred. Upon

the second stipulation, counsel for Pan Am did not claim that the date on its exhibit No. 5 was incorrect and had no reservations about the document being admitted. It was only counsel for Gendron and Bell who stated that he had reservations about the content of some documents, but defendant's exhibit No. 5 was not one of them. Not until the parol evidence was admitted, over objection, did counsel for Gendron and Bell have notice of an issue about the date.

In Rice, supra, the United States Court of Appeals for the Fifth Circuit discussed the enforceability of a stipulation by counsel, saying:

> ...the general rule is that a stipulation is only enforceable by a party to the stipulation against other parties thereto. See e.g., Gold Seal Importers, Inc. v. Westerman-Rosenberg,

> Inc., 133 F.2d 192 (2d Cir. 1943); Nachmand Spring-Filled Corp. v. Spring Products Corp., 74 F.2d 710 (2d Cir. 1935). Care must be taken to assure, considering the peculiar circumstances of a given case, that rigid enforcement of the stipulation does not lead to an injustice. Central Distributors, Inc. v. M.E.T., Inc., 403 F.2d 943 (5th Cir. 1968); Marshall v. Emersons Ltd., 593 F.2d 565 (4th Cir. 1979). If, when counsel for appellants agreed to the court-requested stipulation, seaman status had no impact on his clients' position and no right of his clients was put in jeopardy, it must be determined whether enforcement of that stipulation and dismissal of the third party demand without now allowing appellants an opportunity to be heard might result in an injustice.

An injustice to Gendron and Bell did result from the admission of the parol evidence to prove, not what the real date was, but that it was something other than March 12, 1984. This

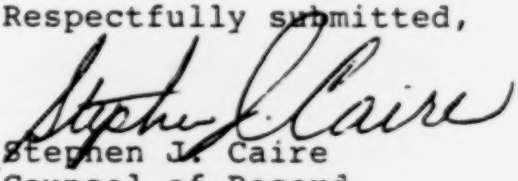
evidence came as a complete surprise and was admitted over objection.

The date on that document proves that the decision to terminate Gendron and Bell was made at least six (6) weeks prior to the date appearing on the peer analysis forms, i.e., April 30, 1984. Therefore, Pan Am's peer analysis for reduction in force was a sham and a pretext. Gendron and Bell were entitled to be evaluated according to the Personnel Policy Manual. The date on that document proves that they were discriminated against from the beginning. Gendron and Bell have proved discrimination on the face of the documents by the introduction of those documents as direct evidence of discrimination.

## CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,



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**APPENDIX**

APPENDIX A

**UNITED STATES COURT OF APPEALS**

**For The Fifth Circuit**

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No. 87-3302
SUMMARY CALENDAR

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CLIFFORD P. GENDRON and
LEONARD B. BELL

Plaintiffs-Appellants
Cross-Appellees

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Defendant-Appellee
Cross-Appellant

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On Appeal from the United States District Court for the Eastern District of Louisiana (CA-86-1920-C(2)

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November 30, 1987

Before: RUBIN, RANDALL and JOLLY
Circuit Judges.

**OPINION OF THE COURT**

**RUBIN, Circuit Judge:***

> *Local Rule 47.5 provides: "The publication of opinions that have no precendential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession."Pursuant to that Rule, the court has determined that this opinion should not be published.

An airline reduced its management force at its New Orleans station from three persons to one person. The two management employees who were terminated as a result contend that the discharge violated the Age Discrimination in Employment Act.1/

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1/ 29 U.S.C. § 621 et seq.

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The district court found that neither of the terminated employees had an Air Frame and Power Plant license issued by the Federal Aviation Administration and the Airline's maintenance policy for many years required that at least one management employee at each line station, such as New Orleans, hold and maintain such a license. He concluded, therefore, that, while the plaintiffs had made a prima facie case of discrimination, this had been rebutted and that the discharge of the plaintiffs was, therefore, not discriminatory. Because the findings of fact are supported by the record, we affirm.

Clifford P. Gendron and Leonard B. Bell, who had previously worked as employees for another line, became Pan Am employees in 1980 as a result

of Pan Am's merger with that airline. Pan Am offered Gendron and Bell management positions as supervisors, ramp/operations in the New Orleans station, and both accepted.

New Orleans was a "line" station, that is, a station where critical maintenance might be required. Pan Am offered testimony that its maintenance policy had for many years required that at line stations at least one employee hold and maintain an Air Frame and Power Plant license issued by the Federal Aviation Administration. This policy is based on Pan Am's need to have a management employ [sic] provide direction and control of the mechanic staff, disseminate information to them, and keep them current with the trouble shooting techniques. Qualified

supervisors are also responsible for insuring that mechanics perform their work according to both the Airline's and the FAA requirements.

By 1984, the number of daily Pan Am flights servicing New Orleans had been reduced from 35, the level in 1980, to about five or six. As the number of flights were reduced, the New Orleans station, as a cost saving measure, consolidated the Ramp/Operations Department with the Line Maintenance Department into a Maintenance/Operations Department. This consolidation, however, did not affect Pan Am's policy of having one maintenance qualified management employee at the station. At the time of the consolidation, Roger Adkins an employee in the department held such a license, but neither Gendron

or Bell held a license and neither had any experience doing maintenance work on aircraft.

In 1983 Adkins left the New Orleans station to take a position in Pan Am's technical center in New York. Three supervisory employees remained in the New Orleans staff, and one of these, George Landry, who had 15 years experience as a mechanic and held a A & P license, applied for and was assigned to the vacated position. In April 1984, the New Orleans station was staffed with four management employees, Bernard Carr, the manager, and three supervisors, Gendron, Bell, and Landry. The general manager, Vernon Hood, who was in charge of all of them, was instructed to reduce the Maintenance/Operations Department to one management employee.

The four management employees in the Maintenance/Operations Department were all more than 40 years of age, Gendron being 48, Carr 45, Bell 43 and Landry 41.

In accordance with Pan Am's reduction-in-force procedures, Hood completed peer analysis forms for each of the supervisors. Because Landry had an A & P license, Hood considered Landry to be the best qualified of the three Maintenance/Operations supervisors. Their scores in the peer analysis were Landry, 13; Bell, 11, and Gendron, 8. Carr was offered and accepted a temporary position as assistant manager of the West Palm Beach station. Because he had been manager of the Maintenance/Operations Department, he was better qualified than either

Gendron or Bell for this position. Bell was offered a temporary position as supervisor in New York, but he declined.

After a two day bench trial, the court rendered detailed findings of fact and conclusions of law, deciding that the plaintiffs had made a prima facie case of age discrimination but that Pan Am had carried its burden of coming forth with evidence of a legitimate, non discriminatory reason to retain Landry in preference to either Gendron or Bell and that the plaintiffs had failed to prove that Pan Am had discriminated against them.

The circumstantial evidence on the basis of which the plaintiffs contended Pan Am discriminated against was not sufficient to persuade the district court. It was his province

to assess the credibility of the witnesses and to appraise the evidence. We cannot say that his conclusions were in error, let alone clearly so. See Fed.R.Civ.Proc. 52a.

The district court correctly held that the action was not frivolous, and therefore correctly denied Pan Am recovery of attorney's fees. Costs, however, should have been assessed in favor of Pan Am as the prevailing party. Accordingly, we amend the judgment to tax costs in the trial court to the plaintiffs-appellees. This does not of course include attorney's fees. As amended, the judgment is affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLIFFORD P. GENDRON and
LEONARD B. BELL

Plaintiffs-Appellants
Cross-Appellees

v. **Civil Action**
**No. 86-1920**

PAN AMERICAN WORLD AIRWAYS, INC.

Defendant-Appellee
Cross-Appellant

**TRANSCRIPT OF REASONS FOR JUDGMENT RENDERED FROM THE BENCH**

**1. MOTION TO EXCLUDE WITNESSES**

MR. CAIRE: Briefly, but I would like to make one final motion and that is to renew my motion for the reasons I stated in the pretrial order, that defendants be excluded from calling any witnesses that have not shown a good cause for the dilatory filing of their witness list and which did cause prejudice to the plaintiff in

not being able to pursue further discovery particularly on Mr. Vernon Hood.

THE COURT: The Court has already ruled on this matter. All we need do is reiterate it for the record, the Court will deny the motion to preclude the defends [sic] from calling witnesses on the basis of failure to timely file a witnesses [sic] list. The Court finds no actual prejudice and finds no basis for the motion.

**2. FINDING OF FACT AND CONCLUSION**

THE COURT: I have very carefully listened to the evidence introduced and read the documentary evidence as well as the testimonial evidence and makes [sic] the following findings of fact and conclusions:

It is stipulated by all parties as follows:

1. Plaintiff's, Mr. Clifford P. Gendron and Leonard Bell were employed by defendant as part of defendant's Maintenance and Operations Section until May 15, 1984 at which time the plaintiffs herein were advised by letter that effective on the close of business on that day their employment was terminated as part of defendant's continuing effort to reduce expenses.

2. Defendant, Pan American World Airways, Incorporated, is a foreign corporation domiciled in the State of New York in which it also maintains its pricipal office and is registered to do business in the State of Louisiana and was doing business in the State of Louisiana at all times material to the allegations in this complaint.

3. Plaintiff, Clifford P. Gendron, filed Charge No. 062-84-2380 with

the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act.

4. The plaintiff, Leonard B. Bell, filed Charge No. 062-84-2378 with the Equal Employment Opportunity Commission under the Age Discrimination in Employment Act.

5. On February 22, 1985, the EEOC notified plaintiffs that it would not proceed further with its processing of the above referenced charges under the ADEA, and at that time advised plaintiffs of their right to sue.

6. At all times material to this complaint the locatio [sic] of employment was New Orleans International Airport, Kenner, Louisiana.

7. Plaintiff, Mr. Clifford P. Gendron, at all times material to this complaint was a resident of

Destrahan, Parish of St. Charles, Louisiana.

8. Plaintiff, Mr. Leonard B. Bell, at all times material to this complaint, was a resident within the geographical boundaries of the United States District Court for the Eastern District of Louisiana; however, shortly after the termination of his employment with the defendant, Pan American World Airways, Inc., Mr. Leonard B. Bell changed his place of residence to 1531 Rogers Street, Chesapeake, Virginia.

9. Plaintiff, Mr. Clifford P. Gendron, at the time of his termination of employment with the defendant was a supervisor of Maintenance/Operations, had completed twenty-two years of service, was forty-seven years of

age and was earning an annual base salary of $30,540.00.

10. Plaintiff, Mr. Leonard B. Bell, at the time of his termination of employment with the defendant was a supervisor of Maintenance/Operations, had completed seventeen years of service, was forty-two years of age and was earning an annual base salary of $30,540.00.

11. The plaintiffs were in the age group protected by the Age Discrimination in Employment Act, (ADEA) which covers the ages forty to seventy; Plaintiff Gendron had attained the age of forty-seven and plaintiff Bell the age of forty-two.

12. The person who was retained by the defendant herein, Mr. Landry, was at the time of this over the age of forty. He was seven years and

two months younger than Mr. Gendron and nineteen months younger than Mr. Bell.

13. Mr. Landry was over forty at the time of the termination of Mr. Gendron and Mr. Bell on May 15, 1984. The respective birthdays of the persons involved here were, Mr. Bell - November 20, 1941; Mr. Gendron August 13, 1936 and Mr. Landry - June 26, 1943.

14. In May, 1984, plaintiffs Clifford P. Gendron and Leonad [sic] B. Bell were employed by Pan Am at its New Orleans Louisiana station as supervisors, maintenance/operations.

15. Gendron and Bell, who had worked for National Airlines became Pan Am employees in 1980 after Pan Am's merger with and acquisition of National. Prior to Pan Am's merger

with National, Gendron and Bell were represented by collective bargaining associations.

16. Shortly after its merger with National, Pan Am offered Gendron and Bell positions in management as supervisors,s [sic] ramp operations. Both accepted.

17. In 1982, in New Orleans, Pan Am consolidated the Ramp Operations department with the Line Maintenance department.

18. New Orleans was, since its inclusion in the Pan Am system after the Pan Am-National merger in 1980, a "line" stations, that is a station where "critical" maintenance on aircraft could reasonably be expected to be required. At line stations, Pan Am maintenance policy had for many years required that at least one management

employee hold and maintain an Airframe and Powerplant license issued by the Federal Aviation Administration, called an A and P license.

19. From 1980 until the consolidation of the line maintenance department with the Ramp operations department in 1982, the line maintenance department was staffed with at least one supervisor, a management employee, who held and maintained an A and P license. Pan Am designates such a supervisor "maintenance qualified" with an MO in personnel filed and on management vacancy bulletins.

20. When the ramp operations de3partment [sic] and the line maintenance department were consolidated in 1982, the consolidated department was staffed with one supervisor who held the A and P license. From the

time of the consolidation until June 1983, Roger Adkins was the supervisor who held the A and P license.

21. When Admins [sic] accepterd [sic] a promotion to New York, George A. Landry applied for and was awarded the vacated position of the supervisor holding the A and P license and became a supervisor, maintenance/operations. Before his promotion to management, Landry had been an A and P licensed mechanic for some fifteen years.

22. When the ramp operations department and the line maintenance department were consolidated, the combined department was called the maintenance/operations department. Gendron's and Bell's titles were changed to supervisor, maintenance/operations. Their duties did not change.

23. Neither Gendron nor Bell had any experience performing maintenance on aircraft. Neither possessed an A and P license. Neither was "maintenance qualified."

24. In 1980, at about the time of the merger with National, Pan Am had approximately thirty-five flights in and out of New Orleans. Because of steadily worsening market forces, by 1984 that number was reduced to approximately six or seven.

25. In late April, 1984, Vernon Hood, the New Orleans station manager, learned from his superiors that he would be required to affect a reduction in management force. That reduction was to affect two of the three departments servicing the flights. The third department -- the passenger sales department -- was not to be

affected by the upcoming reduction in force because it was, in theory at least, a revenue producing department.

26. At the time Hood learned about the reduction in force, the maintenance operations department was staffed with four management employees -- Bernard A. Carr, the manager, and three supervisors, Gendron, Bell and Landry. The customer service department was staffed with four management employees -- Joseph L. Shine, the manager and three supervisors, Joseph C. Bonura, Charles J. Gemelli, and Thomas O. Norris. Between them, the two departments had at least as many management employees as Pan Am had flights in and out of New Orleans.

27. The ages of all four persons in the management operations department were within approximately seven years of one another. Their birthdays were, from oldest defendant to the youngest: Gendron - August 13, 1936; Carr July 28, 1939; Bell - November 20, 1941; and Landry - June 2, 1943. All were over 40 years of age at the time Hood learned about the reduction in force.

28. Hood was instructed to reduce the maintenance operations department to one employee and the customer service department to two employees.

29. Following Pan Am's reduction in force procedures as set forth in its personnel policy manual, on April 30, 1984, Hood completed "peer analysis" forms for each of the six supervisors. In the maintenance operations department, the scores were: Landry,

13; Bell, 11; and Gendron 8. Because Landry had an "A and P" license, Hood considered Landry to be the most qualified of the three supervisors.

30. Carr accepted a temporary position as assistant to the manager of West Palm Beach station, effective May 1, 1984. Because he had been manager of the maintenance operations department, he was more qualified for this position than either Gendron or Bell. On May 1, 1984, Hood advised Bell that he, Hood, had received authorization to offer Bell a temporary position as supervisor, ramp operations in New York. Because Bell had received "exceeds requirements" ratings in his manager performance assessment, he was more qualified for this position than Gendron, who had received only

"meets requirements" ratings in his management performance assessment. On May 2, 1984, Bell declined the offer.

31. By letter to each, dated May 15, 1984, Hood informed Gendron, Bell, Bonura, and Norris that their employment terminated that day because of Pan Am's "continuing effort to substantially reduce expenses." Each man was informed about what his benefits would be.

32. Gendron and Bell filed charges of age discrimination with the Equal Employment Opportunity Commission. That agency issued them "no cause" findings and "right to sue" letters.

33. Gendron and Bell commenced this action in May 1986, alleging that Pan Am's termination of their

employment violated the age discrimination in employment act.

CONCLUSIONS OF LAW

1. At the time of the May 15, 1984 termination in question, the age discrimination employment act prohibited discrimination against persons at least 40 years of age but less than 70 years of age.

2. This Court has jurisdiction of this action pursuant to 28 USC, Section 1343.

3. To make out a prima facie case in a reduction in force situation under the age discrimination employment act, the plaintiff must (1) show that he was within the protected class and adversely affected -- discharged or demoted by defendants employment decision; (2) show that he was qualified for the position in question; and

(3) produce evidence, circumstantial or direct, from which a fact finder might reasonably conclude that the employer intended to discriminate on the basis of age.

The Court finds in this case that the plaintiffs have made out a prima facie case in that they showed that they were in a protected class, that is 40 years of age, between 40 and 70 and that they were adversely affected by the defendant's employment decision. But the mere fact that the plaintiffs in this case were over 40 when their employment was terminated does not end the inquiry. The mere fact that Landry, the person who was retained in this position was somewhat younger is an insufficient factor for determining that the plaintiffs are entitled to recover.

Once the plaintiffs make out a prima facie case, the defendant must come forward with a legitimate non-discriminatory reason for the action taken.

Pan Am's proffered reasons for terminating plaintiffs while retaining Landry, the Court finds satisfied its burden of articulating a legitimate non-discriminatory reason for its actions, that is it is a long standing Pan Am policy in line stations such as New Orleans to have a supervisor, a management employee who holds an A and P license.

Once defendant articulates a legitimate non-discriminatory reason for its actions, the plaintiff must then by a preponderance of the evidence prove that defendants' proffered reason is not in fact the true reason for

its action and is merely a pretext, and that's what this case really boils down to, what has been the main focus in the evidence introduced.

Now, plaintiffs may do this either by showing direct evidence of discrimination or by showing indirectly that the defendants' legitimate non-discriminatory reason is unworthy of belief.

The plaintiffs in this case have the burden of proving their case by a preponderance of the evidence. The Court therefore finds that the plaintiff has failed to discharge their burden of proving their case by a preponderance of the evidence. The Court must therefore rule in favor of the defense.

The plaintiffs have not presented any direct evidence that Pan Am's

policy was a pretext for the discrimination against them. The plaintiffs indirect or circumstantial evidence in this case does not qualify, does not carry the burden of prove. [sic] Plaintiffs' evidence that they were not informed that they would need an A and P license to retain their jobs is irrelevant and is in any event not evidence that the policy was developed and/or applied with a view toward discrimination against plaintiffs, since even if plaintiffs had been informed of this, that the decision making was being made, they could not have qualified, it would have taken them at least two years of training to have even qualified to meet the A and P license requirement.

Plaintiffs further have failed to produce sufficient evidence to

show that Pan Am did not follow its own reduction in force procedure. The evidence is clear that the reduction in force procedures are those which are mention [sic] in plaintiffs exhibit 57, which was the Pan Am personnel policy manual titled management reduction in force dated November 15, 1983, which stated in pertinent part that the individual selected for termination should be performing in the measured group, a peer group, evaluation should be done before any decision is made to terminate an individual. Further, among the things that should be considered in the peer group evaluation and given proper weight are qualifications, abilities and productivity.

The Court finds that Pan Am in this case followed its policy manual

in making the evaluations in this case. The suggestion that the plaintiffs herein were better qualified then [sic] Mr. Landry and Mr. Landry got the position, even if true would not end the inquiry because the inquiry would still be whether there was any age discrimination that took place in the case.

Considering all of the facts and circumstances in this case and weighing the credibility of the witnesses, the Court finds not evidence of age discrimination in this case.

If there was any policy or program or indication that there was anything about the way that Pan Am conducted its business that suggested that it was engaged in a program of retaining younger employees in place of older ones for the purpose of discriminating

against workers on the basis of their age, the evidence in the case that was as presented by both the plaintiff and the defendant indicates there was great care taken to evaluate the employees as to their qualifications and the Court finds that employees were selected as to the ones who could best do the job.

One of the issues I considered was should greater weight be given to seniority or to particular qualifications and I think it is clear that the thrust of the plaintiffs case here is the fact that they thought they were senior to Mr. Landry and therefore they should have been retained. And the irony of it is that they really are in competition with each other because if the policy would have been carried out, one of

the other of the plaintiffs in this case would have had to go, there would have been no basis on which both of them had been retained. But the Court recognizes that fact that Pan Am made a business judgment that in terms of overall qualifications, Mr. Landry best suits the position, the one position that was to be retained in New Orleans and that weight was given to the fact that he had the A and P aircraft mechanics license. It is correct as demonstrated by plaintiff's exhibit or defendant's exhibit 6, which was under the title of justification of layoff due to job abolishment, it was said that Landry was retained as supervisor maintenance operations and his remaining in this current position is due to the requirement of A and P aircraft

mechanic's license, the supervisor of those non-management mechanics and the fleet service staff.

The Court does not feel that I could reach the conclusion that this is based on age discrimination when the Pan Am management was making a management decision as to who was the best all around person, this is the best qualified for this combined position. There is no suggestion of age discrimination in looking at this whole picture and all of the matters discussed. To look at the -- further look at the defense exhibit five which was the document entitled New Orleans management staff, which showed positions to be abolished and with the chart showing the various divisions with Mr. Hood and the general manager at the top, the suggestion

was made that a decision was made before this document was -- on some basis other than the actual evaluation of qualifications because the document was dated March 12, '84, I think that was successfully rebutted by the defense showing that the staff chart was made on the 12th, but that the decision about positions to be ablolished was made at or around the time when the employers were notified. The Court finds no credibility problems with the position taken by the defense as to that issue.

Further, the plaintiff's evidence that they were more experienced and generally better employees then [sic] Mr. Landry, the employee who was retained, is not evidence that Pan Am's policy of having a management employee with an A and P license is

a pretext for age discrimination. And age discrimination plaintiffs may not satisfy and demonstrate pretext by charging the wisdom of an employer's business decision. The age discrimination employment act does not require that old employees receive preferential treatment on the basis of their age. Plaintiffs' theory that Pan Am was required to retain them and terminate younger persons in reduction of force is incorrect.

The law on this subject is quite clear, the cases are legion. In some of the recent cases that the Court found, under 29 USC section 626, I think points this out. To cite a few, the Court of Appeals Sixth Circuit, Kentucky, 307 Federal 2nd, it was held that employers met its burden of articulating for plaintiffs discharge

by proving that selection of plaintiff for termination was based upon relative merits of two men for one position which remained after reorganization. The Court in the Kansas case found that -- 581 Federal 2nd, 812 -- this is The Saints versus Ford Motor Company out of Kansas, 581 Federal 2nd, 812, stated as follows: Evidence that the discharge of 61 year old plaintiff was precipitated by economic down turn, company decided to eliminate two hundred six salaried positions, had nothing to do with plaintiff's age. Another case entitled Stringfellow versus Monsanto Company found at 320 Federal 2nd 1175 states as follows: Employer successfully rebuts age discrimination charge by showing employees were selected for termination on basis of job performance evaluation

rather then [sic] on basis of seniority, that all employees who were terminated were given examinations as to reasons for termination and opportunity to review evaluations and employer attempted to avoid economic impact on terminated employees by establishing placement programs. Further case, Cooper versus Cook et all, [sic], 563 Federal Supplement, 146 which is a 1983 case in the Western District of Missouri, the employers termination was not based on age where evidence showed termination resulted from reduction in force which focused on positions rather then [sic] individuals.

The Court has weighed all of the factors involved in these cases and has reached the conclusion that plaintiffs have failed to carry their burden of proof to show that there

was age discrimination involved in this case and therefore the defendant, Pan Am, is entitled to a judgment in its favor, dismissing the complaint of the plaintiffs.

There has been a request by the defendants herein to require the plaintiffs to pay costs and attorneys fees under Federal Rules of Civil Procedure as well as 26 USC, Section 1927 because they are the prevailing parties in this litigation. The Court has considered that issue as well and has reached the conclusion that I find no frivoulous [sic] attempt on the part of the plaintiffs to pursue their claims. I think the claims were pursued in good faith with the belief that they had some basis for age discrimination, it was a prima facie case that was based merely on

the age involved, however, the evidence just has not borne out the position taken by the plaintiffs. Under those circumstances, I see no basis for assessing cost and attorneys fees in favor of the defendants and against the plaintiffs. I would choose to leave all parties as they stand, the Court will dismiss the plaintiffs' claims, all parties to pay their own costs.

If there is no further business, the Court will stand adjourned.

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CLIFFORD P. GENDRON and
LEONARD B. BELL

Plaintiffs-Appellants
Cross-Appellees

v. **Civil Action**
**No. 86-1920**

PAN AMERICAN WORLD AIRWAYS, INC.

Defendant-Appellee
Cross-Appellant

**J U D G M E N T**

Considering the Court's Findings of Fact and Conclusions of Law rendered in open court on April 7, 1987, accordingly; IT IS ORDERED, ADJUDGED, AND DECREED that there be judgment in favor of defendant, Pan American World Airways, Inc., and against plaintiffs, Clifford P. Gendron and Leonard B. Bell, dismissing the complaint with prejudice, with each party bearing their own costs.

New Orleans, Louisiana, this 10th day of April, 1987.

LORETTA G. WHYTE, CLERK

Approved as to form:

UNITED STATES DISTRICT JUDGE

APPENDIX C

**STATUTES INVOLVED**

Those portions of the Age Discrimination In Employment Act (ADEA) 29 U.S.C. § 621-634 which this case involves provide:

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that --

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain other wise desirable practices may work to the

disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find

ways of meeting problems arising from the impact of age on employment.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer -(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employments, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

§ 626. Recordkeeping, Investigation and Enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion.

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages

or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect

voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) Civil action; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Commission; jury trial

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any

issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

§631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.